IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-700

WALTER FLEISHER CO., INC.,
a corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES and
CITY OF LOS ANGELES,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case involves essentially the same issues as those presented in Sears, Roebuck & Co. v. County of Los Angeles (Docket No. 78-1577). A Writ of Certiorari has been granted in Sears.

This case presents some variation in the Sears facts and will, therefore, provide the Court with more facts from which to judge the

constitutionality of California Revenue & Taxation Code §225.

THE RESPONDENTS' POSITION REGARDING THE PETITION FOR WRIT OF CERTIORARI

The Respondents desire that the Petition for Writ of Certiorari be granted. As previously indicated to the Court, the Respondents believe that this case should be consolidated with Sears, Roebuck & Co. v. County, supra.

THE RESPONDENTS ALSO DESIRE A SPEEDY RESOLUTION OF THESE MATTERS. THE CLERK OF THIS COURT HAS INDICATED THAT ORAL ARGUMENT IN SEARS IS TENTATIVELY SCHEDULED FOR THE SECOND WEEK OF ORAL ARGUMENT IN JANUARY. THE RESPONDENTS DESIRE THAT THIS SCHEDULE BE MAINTAINED.

Toward that end, counsel for Petitioner in this case has stated that he has prepared his legal arguments and can file the Petitioner's Brief within a matter of days after the Court grants the Writ of Certiorari. Respondents can file their brief within days thereafter.

The Respondents therefore respectfully urge this Court to grant the Petitioner's Writ for Certiorari, consolidate this case with Sears, Roebuck & Co. v. County (No. 78-1577) and order briefs to be submitted forthwith.

Counsel for Respondents herein are also counsel for Respondents in Sears, Roebuck. Both Respondents desire consolidation and a speedy determination of the issues herein.

In the alternative, if the Court believes that oral argument cannot be set in January if the cases are consolidated, then another possibility would be to hold this case pending the outcome in Sears.

THE ISSUE

The issue presented by both this case and Sears, Roebuck & Co. v. County, supra, is whether California Revenue & Taxation Code §225 is unconstitutional under the commerce clause (Art. I §8 Cl.), and Congress' statutory scheme regarding tariffs (e.g., the Tariff Act of 1930, and the Trade Act of 1974).

STATEMENT OF THE CASE

The California Court of Appeal decided this case (see Appendix to the Petition for Certiorari). The panel deciding this case was different than that deciding Sears, Roebuck & Co. v. County, but similarly ruled Revenue & Taxation Code §225 to be unconstitutional.

California Revenue & Taxation Code §225 was enacted before this Court's decision in

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). The legislative purpose was not to take away from Congress the power it has to adjust the difference between foreign and domestic goods (see the record in Sears, Roebuck & Co. v. County at p. 219, last paragraph).

Revenue & Taxation Code §225 became effective on January 1, 1976. The opinion in Michelin Tire Corp. v. Wages, supra, was rendered on January 14, 1976. The California tax lien date is March 1st. As a result, Revenue & Taxation Code §225 never operated under "pre-Michelin" conditions.

The Court of Appeal was faced with a situation where (despite good intentions) a statute regulated foreign commerce with the effect of discriminating in favor of foreign goods and against domestic goods passing through the state. The Court of Appeal had a choice. It could have either "redesigned" the statute to prevent these effects, or it could have told the legislature to "go back to the drawing board." It took the latter approach.

The Court of Appeal also held that the County had the right to raise the issues involved here and that it could not redraft Revenue & Taxation Code §225 so as to conform to the U.S. Constitution and the "Tariff Acts." Neither of those questions are presented to this Court in either this case or Sears, Roebuck & Co. v. County, supra.

The legislature has now created an exemption which does not cause discrimination but still has the desired effect of encouraging the shipment of goods into the state. In fact, the legislature gave an exemption to all inventory. (Calif. 1979 Stats. c. 1150 §7.)

ARGUMENT

The Respondents believe that the Court of Appeal was correct.

Both Hines v. Davidowitz, 312 U.S. 52 (1941) and Boston Stock Exchange v. State Tax Comm., 429 U.S. 318 (1976) hold that state regulations causing discrimination, especially in foreign commerce, are within Congress' exclusive authority to regulate commerce.

Congress has exerted that authority as well. Over the history of this country, it has established customs duties specifically designed to regulate foreign commerce and portect domestic industry (see J. W. Hampton & Co. v. United States, 276 U.S. 394 (1928) where this protectionist policy was upheld). Both the Constitution (Art. I §8 Cl. 1) and the Tariff Act of 1930 require that those duties be uniform.

Revenue & Taxation Code §225 alters the balance established by Congress and invades Congress' exclusive authority to regulate foreign commerce.

Revenue & Taxation Code §225 causes discrimination between out-of-state manufacturers and out-of-state customers merely on the basis that the goods are passing through the state.

Revenue & Taxation Code §225 is not a tax. Like the statute in Boston Stock Exchange v. State Tax Commission, supra, it creates a regulation between forms of interstate and foreign commerce.

No other state property tax exemption has the effect of distinguishing between out-of-state manufacturers and out-of-state customers on the basis that the goods are temporarily in the state. 1/

1/ Only four state statutes have anguage which makes foreign-interstate distinctions. They exempt goods as "in transit" however. The Court of Appeal in this case and in Sears, Roebuck & Co. v. County, supra, relied heavily on the fact that "in transit" is parallel to the commerce clause immunity for moving goods. The interpretation of §225 and the three statutes is very different (see Fla. Tax & Fin. Code §196.001; Ga. Pub. Rev. Code §92-186; Miss. Ad Valorem Tax §27-31-13, and La. Const. Art. 7 §21(D)). Even if those statutes were interpreted in the same broad manner as §225, their existence does not change the constitutional objection.

If many states enacted statutes favoring foreign goods over interstate goods, on the basis that they were moving through or temporarily in the state, the tariff regulations of this country would have no effect. In addition, the International Trade Commission could not require uniformity as it is required to do under the Tariff Act of 1930 (19 U.S.C. §§66, 1502(a)). Finally, this country could not tell foreign manufacturers and domestic businesses that American businesses are to be protected by a duty of 1.5%, or 2%, or 2.5%, or more, as it has done (see 19 U.S.C. §1202). This country could not make those representations because 50 states could adjust that level to suit their own interests.

CONCLUSION

The Respondents respectfully urge this Court to grant the Petition for Writ of Certiorari, consolidate this case with Sears, Roebuck & Co. v. County, No. 78-1577 and set oral argument for January 1980.

If argument cannot be set, then an alternative would be to hold this case until Sears, Roebuck & Co. v. County is decided.

Respectfully submitted,

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